LIBRARY
SUPREME COURT, U. S.

No. 1029.

Office-Supreme Court, U.S.
FILED
APR 28 1965
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

PACIFIC NATIONAL INSURANCE COMPANY,
Petitioner,

v.

TRANSPORT INSURANCE COMPANY,
Respondent.

RESPONDENT'S REPLY

To Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

DAN M. BURGE,
RICHARD A. REID and
DONALD E. PREVALLET,
Lynch Building,
Blytheville, Arkansas,
and
JAMES W. STEINSIEK and
JAMES M. GARDNER,
Anthony Building,
Blytheville, Arkansas,
Attorneys for Respondent.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

Page

Introduction 1

Respondent's Statement of the Case 2

Reasons for Denying the Writ and Brief 5

I. Superior, Transport's Insured, Was Only Vicariously Liable for Sikes's Injury 6

II. Federal Jurisdiction Exists and There Has Been No Encroachment Upon a Jury Verdict.. 13

III. Applicable Arkansas Law Does Not Prohibit the Present Action 21

Conclusion 24

AUTHORITIES.

Cases.

Aetna Life Insurance Co. v. Haworth, 300 U. S. 227 (1937) 14

Canadian Indemnity Co. v. U. S. F. & G. Co., 213 F. 2d 658 (9th Cir. 1954) 17

Carrigan v. Carrigan, 218 Ark. 398, 236 S. W. 2d 579 (1951) 20

Cloughey v. Orange Transportation Co., 327 P. 2d 369 (Idaho 1958) 7

Ferguson v. Huddleston, 208 Ark. 353, 186 S. W. 2d 152 (1945) 18

Hill v. Village Creek Drainage, 215 Ark. 1, 219 S. W. 2d 635 (1949) 20

Home Insurance Co. v. Lack, 196 Ark. 888, 120 S. W. 2d 355 (1938) 18, 22

Hommola v. Kluck, 248 F. 2d 731 (8th Cir. 1957) 21

Industrial Indemnity Co. v. General Ins. Co. of America, 28 Cal. Reptr. 568 16

Lizza and Sons, Inc. v. Hartford Accident & Ind. Co., 247 F. 2d 262 (1st Cir. 1957) 14

Maryland Casualty Co. v. Employers Mut. Liability Ins. Co., 208 F. 2d 731 (2nd Cir. 1953) 17
M. F. A. Mut. Ins. Co. v. Mullin, 156 F. Supp. 445 (W. D. Ark. 1957) 18
Muskrat v. United States, 219 U. S. 246 (1911) 14

Pacific Employers Ins. Co. v. Hartford Accident & Indemnity Co., 228 F. 2d 365 (9th Cir. 1955) ..6, 7, 16, 20
Pacific National Ins. Co. v. Transport Ins. Co., 341 F. 2d 514 (8th Cir. 1965) 1, 2
Parsons v. Armour, 28 U. S 413 (1830) 20
Peterson v. Exum, 283 F. 2d 499 (9th Cir., 1960) 19
Pleasant Valley Lima Bean & Warehouse Assn. v. Calif. Farmers Ins. Co., 142 Cal. App. 2d 126, 298 P. 2d 109 16
Prickett v. Hawkeye-Security Ins. Co., 282 F. 2d 294 (10th Cir., 1960) 18

Stanton v. Ark. Democrat Co., 191 Ark. 134, 106 S. W. 2d 584 (1937) 16
St. Louis, Ark. & Tex. Ry. Co. v. Fire Assn., 55 Ark. 163, 18 S. W. 43 (1891) 18
Senko v. Lacrosse Dredging Corp., 352 U. S. 370 (1957) 19
Superior Forwarding Co. v. Garner, 236 Ark. 340, 366 S. W. 2d 290 (1963) 19
Superior Forwarding Co. & Fred Russell v. Sikes, 233 Ark. 932, 349 S. W. 2d 818 (1961) 4, 11

Transport Ins. Co. v. Manufacturers Casualty Ins. Co. et al., 226 F. Supp. 251 (E. D. Ark., 1964) 2
Travelers Ins. Co. v. General Casualty Co. of America, 187 F. Supp. 234 (D. C. Idaho, 1960) 14, 15, 18

Travelers Ins. Co. v. Standard Accident Ins. Co., 329 F. 2d 329 (7th Cir., 1964) 14

United Pacific v. Ohio Cas. Ins. Co., 172 F. 2d 836 (9th Cir., 1949) 17, 18

Wortmont v. Safeco Ins. Co. of America, 227 F. Supp. 408 (W. D. Ark., 1963) 20, 23

Arkansas Statutes.

Arkansas Stats. Ann. (1947), Sec. 66-527 21
Arkansas Stats. Ann. (1947), Sec. 27-801 22

Other Authorities.

American Jurisprudence—
Vol. 27, "Indemnity", Secs. 18 and 19 18
Vol. 35, "Master & Servant", Sec. 533 (p. 962) .. 18
Davis, "Rights and Liabilities in the Insuran Relationshi ", 5 Ark. Law Review 24, 40 and 41 (1950).. 18
Drake, "Torts: Indemnity Between Tort-Feasors", 17 Ark. Law Review 204 18
Jones, Problems Involved in Uninsured Motorist Coverage, 15 Ark. L. Rev. 219, 225 (1961) 23
Restatement of Agency, Sec. 401 (c) 19
Restatement of Restitution, Sec. 95 19

No. 1029.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

PACIFIC NATIONAL INSURANCE COMPANY,
Petitioner,

v.

TRANSPORT INSURANCE COMPANY,
Respondent.

RESPONDENT'S REPLY

To Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

INTRODUCTION.

Respondent, Transport Insurance Company, responds to the petition of Pacific National Insurance Company and objects to the issuance of a writ of certiorari submitting that the judgment of the United States Court of Appeals for the Eighth Circuit (341 F. 2d 514) rendered February 12, 1965, does not involve an inter-circuit conflict; does not conflict with applicable decisions of this Court; does not in any way conflict with applicable state law and since it was decided on sound and existing decisions no impact will be felt therefrom.

Respondent does not accept petitioner's statement of the case as being correct in its entirety. Therefore, it makes its own statement. Respondent recognizes the court's requirement that briefs and responses be direct and concise but it is felt correction of only the errors and deficiencies in the petitioner's statement would not adequately enable the court to follow the previous events and proceedings.

STATEMENT OF THE CASE.

Transport Insurance Company, plaintiff below and respondent here, instituted this action as the subrogee of its only insured, Superior Forwarding Company, against Pacific National Insurance Company, one of the defendants below, and petitioner here. It sought to recover by way of indemnity, not contribution, the amount it had paid on account of a judgment obtained by one Paul Sikes against Superior and petitioner's insured, Fred Russell, in the Circuit Court of Greene County, Arkansas. Transport was successful in a trial before the District Court, **Transport Insurance Company v. Manufacturers Casualty Insurance Company et al.**, 226 F. Supp. 251 (E. D. Ark., 1964), and Pacific appealed to the United States Court of Appeals, Eighth Circuit, where the decision of the lower Court was affirmed in an opinion by Judge Matthes, Pacific National Insurance Company v. Transport Insurance Company, 341 Fed. 2d 514 (1965). Pacific has filed its petition for Writ of Certiorari.

Superior Forwarding Company, a duly licensed interstate common carrier, operating under the tariffs approved by the Interstate Commerce Commission, leased trucks for use in its trucking operations in Northeast Arkansas from Tommy Russell, its commissioned agent, at Corning, Arkansas. Superior would deliver its freight to the Corning warehouse where Tommy Russell would then transport it in his assigned area. On July 19, 1957, Superior, through

its commissioned agent, Tommy Russell, transported a large freezer unit weighing over 1,700 pounds from Corning to Paragould, Arkansas, in a truck that was owned by Tommy Russell and leased to Superior. The driver of this truck, Fred Russell, had been furnished by Tommy Russell in accordance with the terms of the leasing agreement. Tommy was Fred's employer and personally selected and hired Fred; he paid his wages, social security, unemployment tax and provided Workmen's Compensation insurance on Fred. Tommy Russell had complete control and supervision over Fred, dispatched his truck and freight, and had the right to fire him (R. 35, 73, 80, 97). Tommy dispatched Fred to deliver this freezer unit to the consignee, Kroger Grocery Company, and instructed him if he could not unload it himself and the consignee did not, to return it (R. 101). Kroger's store was under construction at the time. Fred Russell, contrary to his instructions, undertook to unload the freight and requested Paul Sikes, a laborer working on the construction site, to assist him. As a result of the said truck driver's negligence, the freezer fell upon Sikes and caused him to sustain serious injuries.

It was stipulated by the parties herein that Sikes was injured while the truck was being unloaded (R. 36).

Manufacturers Casualty Insurance Company, one of the original defendants named in this action, had issued to Tommy Russell a policy of insurance which covered the truck in which the freezer had been transported. Pacific National Insurance Company succeeded to the policy liabilities of Manufacturers. This policy covering the truck in question was the only insurance in force at the time of the accident covering the truck driver, Fred Russell.

Transport was the liability insurance carrier for Superior. Its policy was limited in its coverage and did not provide any coverage for Fred Russell. The District

Court found that the two policies in question provided the coverages indicated above and this finding was not challenged by the petitioner in its appeal to the Eighth Circuit, nor is it now challenged.

Paul Sikes sued Superior, Tommy Russell and Fred Russell in the Circuit Court of Greene County, Arkansas. Pacific, Tommy Russell's insurer, filed a demurrer in his behalf which was sustained. Filing of this demurrer was Pacific's only appearance in the State Court and Pacific never demanded a jury trial although its insured and privy, Fred Russell, did have a jury trial in State Court. From the outset of the Sikes litigation Transport took the position and so advised Pacific, that Fred Russell was an additional named insured under Pacific's policy and Transport called upon Pacific to defend Fred Russell. Pacific adamantly refused to do so and Transport took over the defense on behalf of the truck driver because of its vicarious liability.

In the State Court trial there were three allegations of negligence on the part of Superior in the Sike's complaint. However, not one of the said allegations was submitted to the jury in the Court's instructions or charge as the facts and applicable law did not support a single one of the allegations as a matter of law. The State Trial Court Jury returned a verdict against both Superior Forwarding Company and Fred Russell, the truck driver.

Sikes' judgment against Superior and Fred Russell was affirmed by the Supreme Court of Arkansas, **Superior Forwarding Company v. Sikes**, 233 Ark. 932, 349 S. W. 2d 818 (1961). Transport satisfied the judgment, and then filed this suit in the United States District Court on the theory that Superior was held vicariously liable for Sikes' injuries; that Superior had the right to proceed by way of indemnity against and recover from Fred Russell, the actual tort-feasor; and that as Superior's

subrogee, it is entitled to maintain this action and recover from Fred Russell's insurer. The District Court awarded judgment to Transport which judgment was affirmed by the Court of Appeals.

REASONS FOR DENYING THE WRIT AND BRIEF IN SUPPORT THEREOF.

Petitioner has apparently combined its reasons and its brief together, so the respondent takes the liberty of combining its reasons for denying the writ together with its brief. Respondent wishes in this introductory section, however, to explain its brief so that the Court can better follow the specific problems that confronted both lower courts. Whether by the same name or otherwise both lower courts found:

I. The liability of Superior, this respondent's only insured, was from sufficient evidence before the Court only vicarious.

II. Respondent, as subrogee of Superior had a right to bring the present action and against the petitioner, without first proceeding against anyone else, the Court having jurisdiction of same.

III. The direct action against the petitioner was not prohibited by applicable state law.

Petitioner also raises for the first time the proposition that a jury trial has been denied or that there has been an encroachment upon a jury verdict. This will not be discussed as a separate section but within the points outlined above.

It is respondent's position that since the lower Court's opinion in affirming the judgment awarded by the Trial Court is supported by sound judicial decisions and the Court's interpretation thereof there should be no impact

as suggested by the petitioner. In this connection it is interesting to note that the petitioner has repeatedly questioned the lower Court's conclusion that a multiplicity of suits or circuity of actions is avoided by the procedure followed by the respondent.

I. SUPERIOR, TRANSPORT'S INSURED, WAS ONLY VICARIOUSLY LIABLE FOR SIKES' INJURY.

The general rule of law universally followed is clearly stated in **Pacific Employers Insurance Co. v. Hartford Accident and Indemnity Co.**, 288 F. 2d 365, 373 (9th Cir., 1955), when the Court held that if a tort was committed in accordance with express orders of corporate officers or agents carrying out corporate policy, then the corporation would be a joint tort-feasor with its negligent employee: however, if the tort is the **undirected act** of the employee, although acting within the scope of his employment, the corporation-employer is liable only through the doctrine of respondeat superior. **Cf. Stanton v. Ark. Democrat Co.**, 191 Ark. 134, 106 S. W. 2d 584 (1937).

It was stipulated by the parties hereto in the District Court as follows: "The injury to Paul Sikes referred to in the complaint of the plaintiff (Transport) took place in connection with the unloading of the freezer" (R. 36). The Arkansas Supreme Court so found in Sikes' appeal, when it stated in the first sentence of its opinion as follows: "This is a personal injury case arising out of injuries received by appellee (Sikes) while helping to unload a truck . . ." **Superior Forwarding Co. v. Sikes,** *supra.* Judge Matthes held that this fact was established in the record beyond peradventure of a doubt.

Superior, Transport's insured, at the time and place of the Sikes accident, was operating under a tariff which provided that it was the duty of its consignee to unload the freezer unit. This fact was recognized by the State

Trial Court in the Sikes case as reflected by its instructions (R. 56). The Arkansas Supreme Court, in the Sikes appeal, made the same finding (349 S. W. 2d 818, 819). Therefore, Superior had no legal duty to unload the freezer in question and had specifically instructed Fred Russell, the truck driver, not to unload under the circumstances then and there existing (R. 101). In fact, the tariff made it illegal for the carrier and the consignee to even contract to impose the duty upon the carrier. **Cloughley v. Orange Transportation Co.**, 327 P. 2d 369 (Idaho 1958).

Fred Russell was not authorized to employ others for the purpose of unloading freight (R. 97 and 101). There can be no question but that the freight in question, a freezer weighing over 1,700 pounds (R. 49), could not be unloaded by the driver alone. The Arkansas Supreme Court confirmed this fact in the Sikes opinion.

When Fred Russell undertook to unload the freezer without notifying the consignee, Kroger, and by obtaining the services of others to assist, including Sikes, he was clearly violating the very express orders, instructions and policy of his employers, both Superior and Tommy Russell, as well as Superior's legal duties under its tariff. Such acts on the part of Fred Russell were unquestionably unauthorized and unlawful, as it is undisputed that Superior did not delegate authority to Fred Russell to unload the truck. Under the holdings of **Pacific v. Hartford**, *supra*, and **Stanton v. Arkansas Democrat**, *supra*, this action could and did result in Superior's being only vicariously liable therefor.

Petitioner argues that the three allegations of negligence against Superior, listed on page four of its petition, and which appeared only in the Sikes complaint, established the fact that Superior was negligent and, therefore a joint tort-feasor with Fred Russell, the driver. Of course, it is an elementary principle of law that allega-

tions in a complaint do not constitute evidence. It is further obvious that there was no evidence introduced at the State Court jury trial to substantiate these allegations of negligence since there were no jury instructions given concerning any of Sikes' theories of negligence on the part of Superior (R. 54-60). These facts are undisputed.

The first two allegations of negligence against Superior concerned failure to furnish the driver proper unloading devices and sufficient personnel or helpers to unload. This was not submitted to the jury because as previously stated Superior had no legal duty to unload and the truck driver was specifically instructed not to unload under the circumstances that existed at the time of the Sikes accident. It follows, as a matter of law, that Superior could not be negligent under these two allegations of Sikes' complaint.

The third and only other allegation of negligence on the part of Superior concerned Fred Russell's skill and ability to unload freight. From the record it is quite obvious that there was no evidence to sustain this allegation because there was no instruction concerning same in the Trial Court's charge to the jury. Furthermore, Fred Russell was specifically instructed not to unload the freight under the circumstances then existing (R. 101).

Contrary to petitioner's statement on page 13 of its brief, the truck and freight in question were under the exclusive control of petitioner's two insureds, Tommy Russell and his driver, Fred Russell. They selected the time of delivery, the method of delivery and were the only parties who could conceivably have knowledge as to the time and method used. It, therefore, follows that if anyone was negligent in failing to notify the consignee of the freight's arrival or to secure help in unloading, that person or persons could be no other than petitioner's named insureds, Tommy Russell and/or Fred Russell. If they were negligent in this particular or if they operated

contrary to Superior's specific instructions, Superior could only be liable under the doctrine of respondeat superior.

In giving the jury instructions in the Sikes' trial, the Trial Court had obviously determined as a matter of law that Fred Russell was an employee of Superior as well as Tommy Russell and, therefore, regardless of whether or not Superior was negligent, it would be liable to Sikes if Fred Russell was negligent. The instructions themselves (R. 54-60) do not state any basis on which the jury could have found Superior negligent.

Respondent has answered each possible basis on which petitioner contends Superior might have been negligent. Not one of the alleged acts of negligence of Superior, as asserted by petitioner, even if in fact they had been established by competent proof, could have been a proximate cause of the Sikes' accident as same resulted solely from Fred Russell's illegal and unauthorized act in unloading or attempting to do so. Respondent further has demonstrated that there was ample evidence in the record before the Circuit Court of Appeals justifying their affirmance of the trial Court below regardless of whether or not the opinion of the Arkansas State Supreme Court is binding and conclusive on this Court as to this issue. Judge Young, in his Memorandum Opinion (R. 114), held that "In the State Court action, all allegations of negligence in the complaint filed by Sikes against both Superior and Fred Russell were alleged acts of omission or commission on the part of Fred Russell or Tommy Russell. From a careful reading of the Arkansas Supreme Court opinion, the conclusion is compelling that Superior's liability was vicarious with Fred Russell being the active tort-feasor." Respondent feels that the lower Court was correct in the above-quoted findings and that same could have been sustained on two separate grounds. First, the record before the trial Court established as a matter of law that Superior was not guilty of any negligence that could have been a

proximate cause of Sikes' injury; and, second, the opinion of the Supreme Court in the Sikes' case did determine this fact and same is conclusive and binding on the parties hereto.

Judge Matthes in his opinion (341 Fed. 2d 514, 519), correctly held: "The fact is that the evidence establishes beyond peradventure of a doubt that Sikes was injured during the unloading operation through Fred Russell's (truck driver's) negligence . . . Superior was under no duty to unload freight as it was operating under a tariff which provided that it was the duty of the consignee to unload freight that was too heavy for the truck driver to handle and this record does not establish, even by inference, that Superior had in fact assumed the responsibility of unloading the freezer."

The evidence referred to by Judge Matthes included much more than the general form of jury verdict, as petitioner would have this Court believe. This record consisted of all essential pleadings, exhibits and orders filed with the Sikes' trial Court. all jury instructions given the Sikes' trial jury, discovery interrogatories and the answers thereto, the stipulations of the parties concerning the facts of the Sikes' accident and related issues, the tariff, Interstate Commerce Commission Regulations, the respective insurance policies of the parties hereto, the lease agreement, the testimony of the key parties and witnesses concerning the facts of the case, and, of course, the opinion of the Arkansas Supreme Court. Judge Matthes in his opinion went on to state that " the undisputed facts together with the (Sikes) trial proceedings and the (Arkansas) Supreme Court's opinion compel the legal conclusion that Sikes was injured as a result of Fred Russell's negligence and that Superior's liability was secondary or vicarious" (314 F. 2d 514, 518).

Petitioner, on page 15 of its petition, has quoted a portion of the opinion of the Supreme Court of Arkansas com-

pletely out of context and thereby distorting its holding. In the Sikes' trial there was a disputed fact as to whether or not Fred Russell solicited Sikes' help in unloading (R. 54). On appeal to the Arkansas Supreme Court there was the additional question of whether or not there was any substantial evidence to support the jury verdict. In holding that Sikes made a submissible case for the jury, the Supreme Court held: "The jury could have found from the evidence that Fred Russell, acting within the scope of his authority as agent for the trucking company, obtained the services of Sikes to help unload the heavy equipment; that the equipment was in charge of and under the care of Russell until delivery was completed; . . . that Russell was negligent in the manner of unloading the equipment and that as a result of such negligence Sikes was injured." **Superior Forwarding Co. v. Sikes**, *supra*, 349 S. W. 2d at p. 820.

The above holding unquestionably established that Fred Russell was negligent and that same was a proximate cause of Sikes' injury, otherwise there could have been no recovery against him. While an employer is liable for its employee's negligence, it does not follow that an employee is liable for his employer's negligence. The trial jury found Fred Russell negligent, and to make Superior responsible therefor, further found that at said time and place he was acting within the scope of his authority as an employee of Superior. In discussing the Arkansas Supreme Court opinion, Judge Matthes stated: "This holding (of vicarious liability of Superior) is implicit in the opinion" (342 F. 2d 514, 519). Judge Young in his District Court opinion stated: "The conclusion is compelling that Superior's liability was vicarious with Fred Russell being the active tort-feasor" (R. 114).

It is a rule of universal application that, where the testimony or facts are undisputed and from them all reasonable minds must draw the same conclusion of fact, it is the duty

of the Court to declare as a matter of law the conclusion to be reached.

In the Sikes' opinion, the Arkansas Supreme Court followed an old and established basic rule that in reviewing the evidence to support the verdict of the trial Court, same is viewed in the light most favorable to the appellee (Sikes). The court then reviewed the evidence most favorable for Sikes and adverse to Fred Russell and Superior and found that "the jury could have found from the evidence that Fred Russell, acting within the scope of his authority as agent for the trucking company, Superior . . ." did or performed certain acts thereafter set forth. In other words, the Court was saying that the evidence against Superior, when weighed in the most unfavorable light as to Superior, or most favorable to Sikes, established only vicarious liability on Superior's part. Not one single possible act of negligence on the part of Superior was ever mentioned by the Arkansas Supreme Court after it had carefully reviewed the entire testimony and record before it in the manner previously stated. Thus, vicarious liability was the only possible basis on which the Arkansas Supreme Court could affirm the Sikes' judgment against Superior when weighing the evidence in the most adverse circumstances or unfavorable position of Superior.

As previously pointed out herein, every act of negligence alleged in Sikes' complaint and/or submitted to the jury that could possibly have been a proximate cause of Sikes' injuries, as well as those possible acts of negligence listed in the Arkansas Supreme Court's opinion, were acts of omission or commission on the part of Fred Russell. The lower trial Court was therefore correct when it stated: "From a careful reading of the Arkansas Supreme Court opinion, the conclusion is compelling that Superior's liability was vicarious, with Fred Russell being the active tort-feasor" (R. 114).

The lower trial Court did not substitute its judgment for any jury finding or verdict as it was not necessary to do so to reach its decision. Petitioner, in its brief, makes a somewhat dubious reference that the judgment of the lower Court conflicts with other decisions when it candidly states that "the Court of appeals below **may have** decided an important federal question in a way in conflict with applicable decisions of this Court." However, petitioner has not shown by authoritative citations or decisions any conflict between the judgment and findings of the trial Court and Appellate Court with decisions of this Court.

II. FEDERAL JURISDICTION EXISTS IN THIS CASE AND THERE HAS BEEN NO ENCROACHMENT UPON A JURY VERDICT BY THE COURT OF APPEALS.

Petitioner has made a two prong attack in an attempt to question federal jurisdiction which exists in this case and a theory that a jury verdict was overturned by the Court of Appeals. Respondent, after carefully reviewing cases cited in petitioner's brief, can find little fault with the abstraction of law contained therein. However, when we compare the factual situations in petitioner's authorities with the present matter we find no similarity.

The present case was tried before United States District Judge Young, who made determinations as a jury would since the petitioner waived its right to a jury trial. Petitioner's position is that it now is unsatisfied with the determination of facts made by the trial Court based upon substantially more evidence than petitioner would lead the Court to believe.

It is most noteworthy that trial counsel before the trial judge did not see fit to question whether or not there existed a "case or controversy" for it must have been apparent to him as well as the Court that such did exist.

It was only after present counsel appeared that the constitutional question of case or controversy arose. This contention was aptly answered by the Eighth Circuit Court of Appeals. The appellate Court certainly did not substitute its findings for those of the trial Court sitting as a jury, but rather expressly held the evidence before the trial Court supported its findings. Now, for the first time, petitioner desires this honorable Court to do that of which he complains most.

Respondent is content to rest in consideration of whether or not there is present a "case or controversy" within the meaning of **Muskrat v. United States**, 219 U. S. 246 (1911). As understood by respondent, this requirement is met if the matter before the Court involves the determination or enforcement of present legal rights as they exist between adverse parties. Necessarily, each case involves its own factual problems. The present action does involve a "case or controversy" between the parties. **Travelers Insurance Company v. General Casualty Company**, 187 F. Supp. 234 (D. C. Idaho, 1960). **Cf. Aetna Life Insurance v. Haworth**, 300 U. S. 227 (1937).

The holding by the Court of Appeals is not in conflict with either **Lizza and Sons, Inc. v. Hartford Accident & Indemnity Company**, 247 F. 2d 262 (1st Cir., 1957) or **Travelers Indemnity Company v. Standard Accident Insurance Company**, 329 F. 2d 329 (7th Cir. 1964). In the Lizza case the plaintiff sought determinations of its possible liability upon a bond issued by it to a sub-contractor. No claim had ever been made against the sub-contractor either at the time the action was filed nor at the time the suit was tried. The Court aptly points to the fact that the plaintiff's liability, if any, would be based upon a double contingency of (1) was there a valid contract in existence and (2) was there any loss under that contract. In addition, it was also noted that even if these two contingencies were answered in the affirmative, Hart-

ford, the surety, would be under no liability if its principal paid the loss.

There is no conflict between the holding of the Eighth Circuit and the Seventh Circuit based upon the Travelers case. In that case both insurance carriers were obligated to defend Hoi Sai Gai. At the time the action was decided there had been no determination of whether Hoi Sai Gai was obligated to pay the injured party any amount. Travelers was actually seeking contribution, not indemnity.

Here in our case there has been a determination of negligence, liability and the damages sustained by the injured party and respondent has satisfied that liability. The question of whether petitioner or respondent was responsible for payment of that liability was presented to the lower federal trial Court. It would be most difficult to assume a set of facts that show a more clear, natural, present and definite controversy than that which existed at the time this action was filed between petitioner and respondent.

Apparently, petitioner feels that the present controversy should be limited to Fred Russell, the driver, and that it can seek refuge from determination of its ultimate liability by its assertions that there was no basis of determining respondent's liability to be solely vicarious. Several well-reasoned federal cases negative petitioner's position.

In **Travelers Insurance Company v. General Casualty Company**, *supra*, a declaratory judgment action was brought to determine the question of whether an automobile insurer of a delivery truck or a comprehensive insurer of a general contractor would be required to defend and pay for injuries resulting from an unloading accident. The truck driver and the contractor were not parties to the action. The Court held that the automobile insurer was obligated to furnish coverage, holding in part:

(1). If the contractor was liable for the negligence of his employee, the contractor could recoup his loss from the negligent employee.

(2). If the contractor may recoup his loss, then his insurer may subrogate and collect from the employee or the employee's insurer.

The Court then gives its reason for such rule: "the reason for the rule is obvious. It prevents a multiplicity of suits and holds the insurer liable, who by a circuity of actions, would eventually be obligated to pay any judgment rendered against employer resulting from the negligence of his employee."

The same result was reached by similar reasoning in **Industrial Indemnity Company v. General Insurance Company of America,** 28 Cal. Reptr. 568, determining which company would defend and pay the claim of an injured plaintiff resulting from unloading operations prior to an employer bringing an action against the alleged negligent actor, its employee, and, again in **Pleasant Valley Lima Bean Growers & Warehouse Association v. California Farmers Insurance Company,** 142 Cal. App. 2d 126, 298 P. 2d 109.

Perhaps the language of the Court in **Pacific Employers Insurance Company v. Hartford Accident & Indemnity Company,** 228 F. 2d 365 (9th Cir., 1955), best supports the respondent's contention that it has a right of recovery by proceeding directly against the petitioner.

In that case, Pacific had issued a policy of insurance for "public liability" to Neil (the employer) and Hartford had issued an "automobile public liability" policy to him. One Carter was injured by the negligent action of an employee of Neil. Settlement was made by both companies after which an action for declaratory judgment was filed by Pacific, with the understanding that the set-

tlement would not bar the respective rights of the companies in the declaratory judgment action. It is to be noted that the employer had brought no action of recoupment or indemnity against the negligent employee nor had either insurance carrier proceeded under subrogation against the actor. The Court, relying upon **United Pacific Insurance Company v. Ohio Casualty Insurance Company**, 172 F. 2d 836 (9th Cir. 1949); **Canadian Indemnity Company v. United States Fidelity & Guaranty Company**, 213 F. 2d 658 (9th Cir. 1954); and **Maryland Casualty Company v. Employers Mutual Liability Insurance Company**, 208 F. 2d 731 (2d Cir. 1953), stated: "An insurer providing extended coverage is ultimately liable as against an insurer providing coverage only to the named insured, where the named insured's liability is vicarious only, and that named insured has a right of recovery over against the person or persons primarily liable, to whom coverage has been extended only by the extended coverage provision of the first insurer." The cases relied upon by the Court allow such direct action speaking in terms of avoiding multiplicity of suits or circuity of action, thereby removing the need for proceeding through the tangle of claims to determine ultimate liability.

Certiorari was denied in this case. **Hartford et al. v. Pacific et al.**, 352 U. S. 826, 77 S. Ct. 38, 1 L. Ed. 2d 49 (1946), but petitioner does not mention this fact in its brief.

It is clear that the present situation is exactly what is meant by the federal Courts in speaking of avoidance of a circuity of actions. To follow petitioner's position to a conclusion would require an action directly against Fred Russell. Then if determination be made upon the evidence, which would be the same as was before the trial Court below, of vicarious liability, a second and separate action in federal Court would have to be filed against petitioner. It would appear that such procedure would further add to the congestion of our trial dockets and would further

delay the determination of ultimate liability between petitioner and respondent. Fortunately, petitioner's views in this regard have not met with approval of federal or state Courts.

Respondent's insurance policy specifically provides that as insurer of Superior, it is subrogated to all rights held by Superior, which fact petitioner apparently concedes (R. 10). Also, by paying the judgment against its insured, Superior, respondent becomes subrogated to Superior's right by law. **Cf. M. F. A. Mutual Insurance Company v. Mullin**, 156 F. Supp. 445, 455 (W. D. Ark. 1957).

Respondent's right to bring the instant action for indemnity is settled law in Arkansas. As the able District Trial Judge stated: "a principal who has been held vicariously liable to a third person for the tortious conduct of its agent has a cause of action against the agent for the damages occasioned by such conduct. It follows that the principal's insurer, as subrogee of the principal, is entitled to indemnity against the agent or its insurer" (R. 112). **Cf. Ferguson v. Huddleston**, 208 Ark. 353, 186 S. W. 2d 152 (1945); **Home Insurance Company v. Lack**, 196 Ark. 888, 892, 120 S. W. 2d 355, 357 (1938); **St. L., Ark. & Tex. Ry. Co. v. Fire Ass'n.**, 55 Ark. 163, 174, 18 S. W. 43, 46 (1891). See also Davis, **Rights and Liabilities in the Insurance Relationship—A Partial Survey**, 5 **Ark. L. Rev.** 24, 40 and 41 (1950) (citing cases); Drake, **Torts: Indemnity Between Tort-Feasors**, 17 **Ark. Law Rev.** 204; 27 **Am. Jur.**, Indemnity, §§ 18 and 19 (1940).

This theory has been universally recognized. See **Prickett v. Hawkeye Security Insurance Company**, 282 F. 2d 294 (10th Cir. 1960); **Travelers Insurance Company v. General Casualty Company**, *supra*; **Pacific Employers Insurance Company v. Hartford Acc. & Ind. Co.**, *supra*; **United Pacific Insurance Company v. Ohio Casualty In-**

surance Company, *supra*; 35 **Am. Jur.,** "Master and Servant," Section 533, page 962; **Restatement of Agency,** Sec. 401 (c); **Restatement of Restitution,** Sec. 95.

Many decisions support the view that an appellate court cannot substitute its findings for those made by a jury based upon conflicting evidence. Petitioner had its right to a trial by jury before the federal trial Court but chose not to assert such right. It now complains that the factual determination which held it liable is not to its fancy and in effect says **there might be** a decision which violated a right of trial by jury. Many of the cases cited involve decisions made under the F. E. L. A. and other related statutes. No civil case has been cited which states a party cannot waive a jury trial if it desires.

Petitioner questions the lower Court's authority to examine the Sikes' jury verdict to ascertain on what facts it was based. The federal Courts and the Arkansas Supreme Court have always had the inherent or common law right to examine the evidence and to determine if there is a reasonable basis for the jury's decision and even set same aside in its entirety where reasonable men must conclude that there is no substantial evidence to support the verdict. **Peterson v. Exum,** 283 F. 2d 499, 502 (9th Cir., 1960); **Senko v. LaCrosse Dredging Corp.,** 352 U. S. 370, 374 and 378 (1957); **Superior Forwarding Company v. Garner,** 236 Ark. 340, 366 S. W. 2d 290 (1963).

However, this is not the issue before this Court. The lower Court did not set aside the Sikes jury verdict, it did not direct a verdict, and it did not enter a judgment notwithstanding the jury's verdict. The finding of the lower Court as affirmed by the Circuit Court of Appeals, that Superior's liability was only vicarious, is not contrary to the Sikes' jury verdict or the Arkansas Supreme Court's opinion, nor does it deprive petitioner of a jury trial (petitioner voluntarily waived a jury trial in the

lower district Court by having failed to request one). Neither does the lower Court's opinion or holding constitute a violation of the Seventh Amendment to the Constitution of the United States. **Cf. Parsons v. Armour**, 28 U. S. 413 (1830).

The question of Superior's negligence as alleged in the Sikes' complaint was not submitted to the Sikes jury since there was no evidence to support same as a matter of law. Petitioner had every opportunity to participate in that trial but repeatedly refused to do so. Its insured participated therein and since petitioner stands in privity with its insured, Fred Russell, it was the real party in interest in the Sikes' case and its right and obligations are measured by those of Fred Russell. This relationship makes petitioner herein conclusively bound by the facts as established in the Sikes action. **Wortmont v. Safeco Insurance Company of America**, 227 F. Supp. 468 (W. D. Ark. 1963); **Carrigan v. Carrigan**, 218 Ark. 398, 236 S. W. 2d 579; The Arkansas Supreme Court in **Hill v. Village Creek Drainage**, 215 Ark. 1, 219 S. W. 2d 635, stated that the law was best summarized in 30 **Am. Jur.** 960, as follows: "The strict rule that a judgment is operative under the doctrine of res judicata, only in regard to **parties and privies** is sometimes expanded to include as parties, or privies, a person who is not technically a party to a judgment, or in privity with him, but who is, nevertheless, connected with it **by his interest** in the prior litigation and **by his right to participate therein**" . . . (emphasis added).

Respondent feels that under the determinations made by the trial Court upon evidence before it, there was clearly a case or controversy existing between respondent and petitioner and that the case of **Pacific Employers Insurance Company v. Hartford Accident and Indemnity Company**, *supra*, wherein certiorari was denied clearly refutes petitioner's theory that no cause of action existed against it. The trial judge determined the law as existing

in the State of Arkansas and respondent feels that there is no conflict existing between the various circuits as asserted by petitioner. For such reasons, respondent has a direct cause of action against petitioner based upon indemnity and the recovery was properly affirmed by the Circuit Court of Appeals.

III. APPLICABLE ARKANSAS LAW DID NOT PROHIBIT THE PRESENT ACTION.

It should first be pointed out, in responding to petitioner's proposition that Arkansas law has not been followed, that in diversity cases governed by state law the Circuit Court of Appeals did not and should not function as the Supreme Court of the State of Arkansas and it was required to accept the views of the trial judge with respect to any doubtful question of local law. See **Hommola v. Kluck**, 248 F. 2d 731, 733 (8th Cir. 1957). Apparently the Circuit Court of Appeals did this because although the so-called "direct action" statute was raised by the petitioner herein before them, they found no need to comment thereon.

Respondent takes issue with the petitioner that the decision below permits direct actions by injured parties against the tort-feasor's insurer. The present case does not involve the question of whether or not the driver or employee, Fred Russell, was negligent. It does not involve the amount of damages sustained by the injured party. Those facts have been conclusively established in the State Court action. This is not a suit by an injured party against the tort-feasor and his liability insurance company. The prohibition announced by **Ark. Stat. Ann.**, § 66-527 (1947, as amended), and the two cases cited by petitioner construing same, is simply that an injured person cannot join a tort-feasor and his liability insurance carrier in an original action to determine the question of liability and amount of damages sustained by the injured

party. Neither the statute, the two Arkansas cases cited, nor the cases from the other jurisdiction cited by petitioner are authority for the contention that an indemnity action in Arkansas cannot be brought against the party ultimately responsible for damages sustained. Especially is this true when the damages have heretofore been determined and the question of liability established. The statute relied on by petitioner does not allow or authorize garnishment after judgment. It contemplates a direct action to determine coverage where the questions of damage and liability have been determined.

Respondent's position is not and has never been that of an injured party suing a tort-feasor and his liability insurance carrier. Respondent's theory on the action which it brought is and was based upon an implied right of indemnity against petitioner and it was not an action for contribution. Respondent has contended that since its insured, Superior, was only vicariously liable for the tortious conduct of Fred Russell, Superior is entitled to recover by way of indemnity from Fred Russell. Respondent, as subrogee of Superior, is entitled to the same right of recovery against Fred Russell and/or petitioner, his only insurer.

Arkansas allows an insurance company to be a party in a direct action under its subrogation rights against a wrongdoer. In **Home Insurance Company v. Lack**, *supra*, a liability carrier paid property damage to its insured and then joined with the insured seeking recovery from the negligent party. The insurance company was a real party in interest under **Ark. Stat. Ann.** (1947), § 27-801. The Court in construing this statute had to determine who a real party in interest should be. It stated that the statute would be liberally construed and that the Court would be guided by such considerations as would most speedily and economically bring litigation to an end, if at the same time, the ends of justice were conserved. This deci-

sion clearly establishes that the law of Arkansas is to avoid a multiplicity of suits. To require respondent to proceed first against Fred Russell and obtain a judgment as a condition precedent to this action would be an idle or useless act and to interpret the statute quoted by petitioner as prohibiting the course followed by this respondent would be an interpretation unsupported by any precedent in Arkansas law. An interpretation such as that would be in essence saying that in Arkansas an insurance company can never be a party in interest such as in the Home Insurance Company case quoted above. Additional authority for holding insurance company as real parties in interest is found in actions involving "uninsured motorist coverage." See **Wortmont v. Safeco Ins. Co.**, *supra*, and Jones, **Problems Involved in Uninsured Motorist Coverage**, 15 **Ark. L. Rev.** 219, 225 (1961).

In the **Wortmont** case, *supra*, Judge Gordon Young, who sat as the trial judge in this case below, interpreted applicable Arkansas law, and held that the fact the damages to which Wortmont might be entitled had not been determined, was not a defense to the direct action against the insurance company and that such was not a prerequisite to bringing the direct action against the insurance company. It would seem that if the statute relied on by the petitioner herein prohibits the present action it even more so prohibits the direct action as allowed in the **Wortmont** decision. Judge Young did, in both cases, however, clearly and correctly interpret the applicable Arkansas law finding that this respondent was entitled to bring this action and in effect saying that this procedure would most speedily and economically bring the litigation to an end, while at the same time conserving the ends of justice.

This respondent respectfully submits that the decision below does not in any way conflict with applicable state law.

CONCLUSION.

Respondent respectfully prays that petitioner's petition for a writ of certiorari be denied for the reasons that the decision of the Federal District Court as affirmed by the Eighth Circuit Court of Appeals, is not in conflict with any decisions of this Court; is not in conflict with any decisions of other circuits and it does not conflict with applicable state law. Respondent submits that the judgment of the lower trial Court and the opinion of both the trial and appellate Courts are amply supported by authorities and legal precedents as set forth in those opinions and this brief.

Respectfully submitted,

DAN M. BURGE

RICHARD A. REID, and

DONALD E. PREVALLET,
Lynch Building,
Blytheville, Arkansas; and

JAMES W. STEINSIEK and

JAMES M. GARDNER,
Anthony Building,
Blytheville, Arkansas,
Attorneys for Respondent.